B. Fundamental Tenets of Statutory Construction Prevent Reading the Highest Standard of Proof Into 25 U.S.C. 1912(d).

Petitioner's policy arguments that Congress intended that active efforts should be proven beyond a reasonable double ignore the basic rule of statutory construction that "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16 (1983). Petitioner argues that because Congress explicitly requires the proof beyond a reasonable doubt of the "serious physical of emotional damage" determination in 25 U.S.C. §1912(f), trial courts should presume that it intended the same standard of proof for the "active efforts" determination. However, as the Wisconsin Court of Appeals stated, "if Congress had wanted the higher burden of proof to apply to the active efforts determination, it certainly could have so specified" (P-App. A-10).

The Petition should be denied because Congress could have assigned the criminal burden of proof to the active efforts determination but declined. The plain language of the statute and apparent Congressional intent do not support revision of the statute.

C. A Proper Analysis of the Three-Part Test Articulated By This Court Supports an Application of the Clear and Convincing Evidence For the Active Efforts Determination.

This Court established clear and convincing evidence as the correct standard of proof for termination of parental

rights cases in its decision in *Santosky v. Kramer*, 455 U.S. 745 (1982). As noted by Petitioner's Brief, the *Santosky* Court applied the three-part due process analysis articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). However, Petitioner ignores the legitimate interests of the child in a TPR case and understates the countervailing state interests in preserving the standard of proof established by this Court.

Congress' enactment of the Adoption and Safe Families Act of 1997, Pub. L. 105-89, reflects Congress' concern for providing permanent homes for foster children as soon as possible after reunification efforts fail. Among other things, the Act requires the states, under threat of financial penalty, file for termination of parental rights whenever a child has been placed out of the parental home for fifteen of the preceding twenty-two months, absent certain exceptions.[1] 42 U.S.C. §675(5)(E). At the time this Court decided *Santosky*, this federal concern for permanence for foster children was not so clearly part of the equation. When Petitioner argues that in an ICWA case, the interests of a parent are even more commanding than in other TPR cases, she ignores the heightened federal interests of children who have spent unreasonable time in the impermanence of foster care.

The strict federal time limits imposed upon states for filing TPR cases has also altered the equation for analyzing the state's interest in preserving the middle burden of proof established by *Santosky*. With the enactment of ASFA, permanence and stability for children is now also a compelling state interest. Raising the standard-of-proof bar would hamper

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[1] None of the exceptions (child placed with a relative, termination of parental rights not in child's best interests, reasonable efforts not made to reunify family; 42 U.S.C. 675(5)(E)(i)(ii)(iii)) applied in this case.

the legitimate government interest in seeking permanent homes for children languishing in foster care. To ascribe to the active efforts determination the highest burden of proof could also impose a serious financial burden upon government in the form of continued foster care payments in cases where the high standard of proof discourages TPR filings or hinders the prosecution of meritorious TPR petitions. Petitioner errs when she claims that the State can articulate no greater interest in preserving the standard of proof this Court established in *Santosky*.

Petitioner's attempt to apply more stringent due process scrutiny to the standard of proof that this Court undertook in *Santosky* is ill-conceived. Absent any declaration of intent by Congress to impose the highest standard of proof to the active efforts requirement, this Court need not revisit *Santosky* and the Wisconsin courts application of its holding.

II. THE CLEAR TREND IN STATE COURT DECISIONS IS TO ASCRIBE THE MIDDLE BURDEN OF PROOF TO THE "ACTIVE EFFORTS" REQUIREMENT.

Contrary to Petitioner's suggestion, there is no significant current conflict among state courts regarding the standard of proof for the active efforts determination. The South Dakota Supreme Court is the only state court of last resort reviewing a TPR case that held that the active efforts requirement must be proved beyond a reasonable doubt. *In the Interest of S.R.*, 323 N.W.2d 885 (S.D. 1982).[2] The other state

[2] The other state Supreme Court case cited by Petitioner, *In the Matter of G.S. and S.S.*, 59 P.3d 1063 (Mt. 2002), is not a TPR case; thus, the language in the opinion is dicta with regard to the standard of proof in TPR cases.

Supreme Courts that have faced this issue in a TPR case have all found the appropriate burden of proof to be clear and convincing evidence or less. *See In re Annette P.*, 589 A.2d 924 (Me. 1991), *K.N. v. Alaska*, 856 P.2d 468 (Alaska 1993), *In the Matter of Baby Boy Doe*, 902 P.2d 477, 482 (Ida. 1995), and *In re Interest of M.S.*, 624 N.W.2d 678 (N.D. 2001). The Alaska Supreme Court relied upon an analysis of legislative history to reject the criminal standard of proof, and then made note of the absence of statutory analysis on by the courts that supported this burden of proof.[3] *K.N. v. Alaska*, 856 P.2d at 476.

Furthermore, the better reasoned and more recent lower state court decisions have also rejected the highest burden of proof for the active efforts determination. *See In re Michael G.*, 63 Cal. App. 4th 700, 74 Cal. Rptr. 2d 642, 648 (Cal. Ct. App. 1992),[4] *In re Dependency of A.M.*, 22 P.2d 828, 833-34 (Wash. Ct. App. 2001), *In re Cari B.*, 763 N.E.2d 917 (Ill. App. 2002).

Significantly, all of the lower state court decisions cited by Petitioner pre-date the federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89. *See In the Matter of M.S.S.*, 465 N.W.2d 412, 418 (Minn. Ct. App. 1991), *In re L.N.W.*, 457

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[3] The totality of the South Dakota Supreme Court's analysis was: "we assume that the same burden required to prove serious emotional or physical damage under §1912(f), beyond a reasonable doubt, would also be required to prove active efforts."

[4] This California court was one of the few to reference a rule of statutory construction in its analysis: "when the Legislature has employed a term in one place and has excluded it in another, it should not be implied where excluded. (Citations omitted) If Congress meant for the 'active efforts' determination to be supported by evidence beyond a reasonable doubt, it coulod have easily said so." 74 Cal. Rptr. at 648.

N.W.2d 17, 19 (Iowa Ct. App. 1990), *In the Matter of Kreft*, 148 Mich. App. 682, 693, 384 N.W.2d 843, 849 (1986).[5] Addressing the national problem of children languishing years in foster care without permanent homes, the Act, among other things, requires states to seek termination of parental rights for children who have been in foster care for fifteen of the previous twenty-two months, unless certain exceptions apply. 42 U.S.C. 675(5)(E) (2003). In light of this federal policy to ensure timely terminations of parental rights and adoptions for children, it is highly likely that were this standard of proof issue to arise again in jurisdictions that have not addressed it in fourteen years or more, those jurisdictions would follow the national trend to the middle burden of proof.

Review of this issue by the United States Supreme Court is not necessary because the natural development of the law in the various jurisdictions around the country is highly likely to continue the trend toward uniformity among the states on the issue presented by the Petition.

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[5] This writer has found only one lower state court decision rendered after the enactment of the Adoption and Safe Families Act that support the highest burden of proof: *In the Interest of R.L.*, 961 P.2d 606, 609 (Colo. App. 1998), noting that (at that time) most courts had mandated the highest burden of proof.

CONCLUSION

Based upon the foregoing, the Guardian ad Litem for Branden respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted this 30th day of September, 2005.

MICHAEL J. VRUNO, JR.
Gu ırdian ad Litem

LEGAL AID SOCIETY
OF MILWAUKEE, INC.
Guardian ad Litem Division
10201 Watertown Plank Road
Milwaukee, WI 53226

EXCERPT FROM *RECOMMENDED GUIDELINES FOR STATE COURTS: INDIAN CHILD CUSTODY PROCEEDINGS*

44 Fed. Reg. 67,592:

D.2 Efforts To Alleviate Need To Remove Child From Parents or Indian Custodians

Any party petitioning a state court for foster care placement or termination of parental rights to an Indian child must demonstrate to the court that prior to the commencement of the proceeding active efforts have been made to alleviate the need to remove the Indian child from his or her parents or Indian custodians. These efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.

D.2 Commentary

This section elaborates on the meaning of "breakup of the Indian family" as used in the Act. "Family breakup" is sometimes used as a synonym for divorce. In the context of this statute, however, it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health.

This section also recommends that the petitioner take into account the culture of the Indian child's tribe and use the resources of the child's extended family and tribe in attempting to help the family function successfully as a home

for the child. The term "individual Indian care givers" refers to medicine men and other individual tribal members who may have developed special skills that can be used to help the child's family succeed.

One commenter recommended that detailed procedures and criteria be established in order to determine whether family support efforts had been adequate. Establishing such procedures and requirements would involve the court in second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments.